v. Public Prosecutor [1963] 29 MLJ 26 wherein Adams J. said *inter alia* that:

> the question of intention to defraud remains at all times to be proved by the prosecution in the same way as 'intention' is proved in all criminal cases where guilty knowledge is one of the ingredients of the offence.

Bearing that in view, what does the evidence show? Here, the learned Magistrate has held that the relevant goods were uncustomed and that the appellant knew they were uncustomed goods at the time he conveyed them. If he realised the goods were uncustomed, as a public carrier of some 20 years experience, he should have refused to convey them. Indeed, there was all the more reason for him to refuse if, as he alleged, the goods belonged to some strangers who had not paid the relevant customs duties on the goods. That he did not do so is clear testimony that the appellant had deliberately and positively assisted them in evading customs duties on the goods. Furthermore, the amount of goods he was conveying was quite substantial consisting of 1052 cartons of beer and hence, he would, as a reasonable man, have known that the amount of customs duties payable thereon would also be substantial. In fact, the authorities valued the amount to be exactly RM34,400.32. Under the circumstances, it is, I think, reasonable and proper to conclude, as the learned Magistrate had done, that the appellant had intended to defraud the Government. There is therefore no merit in Mr. Lim's last proposition.

For the reasons stated, I will dismiss the appeal against conviction. As regards sentence, it is sufficient for me to say that there is nothing in the record to indicate that the learned Magistrste had applied the wrong sentencing principles nor do I think that the amount of fine to be manifestly excessive in all the circumstances. Accordingly, the appeal against sentence is also dismissed.

LEE CHI MIN

v.

LEOW TEOW HONG & 2 ORS.

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG. 71 OF 1993/II]
23 FEBRUARY 1994

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application to strike out plaintiff's claim.

COMPANY LAW: Director transferring shares to 1st & 2nd defendants - Share transfer entered into register by 3rd defendant - Plaintiff disagreeing with transfer of shares - Extraordinary general meeting held - 1st & 2nd defendants appointed additional directors in absence of plaintiff - Plaintiff issuing writ against defendants seeking declarations, rectification of the register and injunction - Validity of the transfer of shares - Validity of the notice to appoint and appointment of the 1st & 2nd defendants - Consideration of ss. 103, 104, 105, 145(2) of the Companies Act 1965.

The plaintiff was a director and registered shareholder of 8,083,001 shares in a family company, Poh Kwong Holdings Sdn Bhd (the company) and his son, Li Wing Fong (LWF) was the only other shareholder and director holding 11,317,001 shares. On 29 April 1993, LWF transferred 10,000 shares each to the 1st and 2nd defendants which was entered into the register of the company by the 3rd defendant, the company secretary. The registration took place a day earlier than the letter seeking approval for the transfer. The plaintiff disagreed with the transfer of shares and requested a board meeting with LWF which ended in a dead lock. Subsequently, a notice was issued on 22 May 1993 for an extraordinary general meeting where the 1st and 2nd defendants were appointed additional directors of the company in the absence of the plaintiff who did not attend although served with the notice. The plaintiff then issued a writ and statement of claim against the defendants which was amended on 17 June 1993, praying for *inter alia* declarations to the effect that the transfer of the shares, the notice to appoint and the appointment of the 1st and 2nd defendants were illegal and invalid, rectification of the register and an injunction restraining the 1st and 2nd defendants from acting as directors.

Held:

[1] The pleadings lacked material facts to support the prayers sought. The plaintiff wanted a declaration that the transfer of shares and the registration thereof from LWF to the 1st and 2nd defendants were not *bona fide* in the interest of the company and therefore illegal and invalid. Why was it illegal and invalid? Was it in contravention of the law or the articles of association of the company? If the provisions of the articles were complied with, such transfer was valid. Under s. 103 of the Companies Act 1965 (the Act) if a proper instrument of transfer had been delivered to the company, it could not refuse the registration of such transfer. If the company failed to comply, it and every one of its officers committed an offence. *Prima facie* the shares were transferable unless done in a manner contrary to the provisions in the articles.

[2] Did the registration entered a day earlier than the letter seeking the approval for the transfer render the registration illegal and invalid as contended by the plaintiff? On the delivery of a proper instrument of transfer to the company, the transfer became registrable and on the request in writing made by the transferor pursuant to s. 104 of the Act, the company was obliged to enter in the register the name of the transferee. It was not disclosed in the pleadings whether the approval sought by LWF for the transfer of the shares was in fact a request pursuant to s. 104 nor was it disclosed whether a proper instrument of transfer had been delivered to the company and if so when. If the proper instrument of transfer had been delivered before 30 April 1993 then the transfer became registrable before that date as might well have happened in this case as the transfer was already registered on 29 April 1993. If that be so, the entry in the register of the names of the two defendants before 30 April 1993 could not be illegal and invalid because s. 104(1) of the Act equates only the request in writing of the transferor to that of an application for the entry made by the transferee.

[3] The plaintiff averred that the notice of the meeting was illegal and invalid principally because the two defendants were not shareholders on the date of issue of the notice of meeting. If it could not be ascertained from the pleadings that the transfer and registration of shares were illegal or invalid, then the two defendants as members of the company enjoyed the rights and privileges given by law as members and it then followed that the defendants were entitled to issue notice for the meeting to appoint additional directors.

[4] The Court was satisfied that there was no basis for the granting of the various declarations and orders sought in the amended writ and amended statement of claim which disclosed no reasonable cause of action. On that ground alone the Court was satisfied that the plaintiff's pleadings ought to be struck out with costs of the action and of the application to the defendants to be taxed.

[Defendants' application allowed with costs to be taxed].

Legislation referred to:
Companies Act 1965, ss. 103, 104, 105, 145(2)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - John Lee; M/s. Lee & Co.
For the defendants - Alvin Chong; M/s. Alvin Chong & Co.

JUDGMENT

Haji Abdul Kadir Bin Sulaiman J:

This is an application by the defendants under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) and under the inherent jurisdiction of the Court for the striking out of the plaintiff's claim on the ground that it discloses no reasonable cause of action, or is scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the Court.

The plaintiff is a director and a registered shareholder of 8,083,001 shares in a family company, Poh Kwong Holdings Sdn. Bhd. (the company). Until 28 April 1993, the only other shareholder was his son, Li Wing Fong (LWF), holding 11,317,001 shares, who was also the other director of the company. From 29 April 1993, the 1st and 2nd defendants became shareholders of the company through the transfer of 10,000 each of the shares of LWF to them, which was entered in the register of the company by the 3rd defendant who is its secretary. On 22 May 1993, the 1st and 2nd defendants were appointed additional directors during the extraordinary general meeting of the company. The plaintiff did not attend the meeting though he was issued with a notice for the purpose.

On 7 May 1993 the plaintiff wrote to the company requesting for a board meeting to be held on 12 May 1993 to discuss the issue of the said transfers of LWF's 20,000 shares to the 1st and

the 2nd defendants. On 12 May 1993 as scheduled, both the plaintiff and LWF being the two directors of the company then, attended the meeting. At the meeting there was a dead lock as the plaintiff disagreed but LWF agreed to the transfers. So there was no resolution passed by the two directors to refuse registration of the transfers of the said shares of LWF to the 1st and the 2nd defendants. Pursuant to a notice issued, on 22 May 1993 an extraordinary general meeting was held to appoint additional directors of the company. It was attended by LWF, the 1st and the 2nd defendants but the plaintiff did not, though the notice was served on him. At the said meeting the two defendants were appointed as additional directors. On 29 May 1993 the plaintiff issued a writ against the 1st and the 2nd defendants and the secretary as the 3rd defendant. The writ and the statement of claim were amended on 17 June 1993. LWF is not cited as a party to the action, neither is the company. The plaintiff claims for:

(i) a declaration that the said transfers of shares and their registration were not *bona fide* the interest of the company and therefore illegal and invalid;

(ii) a declaration that the notice of extraordinary meeting dated 3 May 1993 for a meeting on 22 May 1993 to appoint the 1st and the 2nd defendants as additional directors, was illegal and invalid;

(iii) a declaration that the meeting of 22 May 1993 was illegal and invalid;

(iv) a declaration that the appointment of the two defendants as additional directors, was illegal and invalid;

(iv)(a) a declaration that any of the board of directors' meetings of the company attended by the 1st and the 2nd defendants in their purported capacities as directors of the company including the board of directors' meeting to be held on 2 June 1993 in Kuala Lumpur was/were illegal and invalid;

(v) an order for the third defendant to rectify the register by deleting the names of the 1st and the 2nd defendants from it.

(vi) an injunction to restrain the two defendants from acting as directors, damages, interests, costs and any further order or relief as the Court deems fit.

From the pleadings contained in the amended statement of claim of the plaintiff, it is clearly seen that the plaintiff is unhappy with what his son LWF has done by transferring 20,000 of his shares to the 1st and 2nd defendants thereby increasing the number of members in the company and subsequently increasing the number of directors in the company thereby depriving him "of equal control of the board of directors". He tried to prevent the registration of the transfer but there was a dead lock in the meeting of the directors for the purpose and no effective refusal was resolved at the meeting because the other director, his son LWF, agreed to the transfer, naturally because he was the transferor of those shares. Subsequently, when an extraordinary meeting was called to appoint the 1st and the 2nd defendants as additional directors, the plaintiff did not attend the meeting and so the two defendants were duly appointed as such. On 26 May 1993 a notice was issued of a board meeting to be held on 2 June 1993 in Kuala Lumpur. The plaintiff is unhappy with this as well. Hence the prayers in the amended statement of claim.

The pleadings lack material facts to support the prayers sought. In the first prayer, the plaintiff wants a declaration that the transfers of shares and the registration thereof from LWF to the 1st and the 2nd defendants were not *bona fide* in the interest of the company and therefore illegal and invalid. Para 11 of the pleadings avers that the transfer and its registration were not made *bona fide* in the interest of the company but were oppressive and unconscionable and made in furtherance of LWF's scheme to have the two defendants appointed as directors so as to deprive the plaintiff of equal control of the board of directors and were hence illegal and not valid. The question to ask is why is it illegal and not valid? Is it in contravention of any provisions of the law or the articles of association of the company? Being a private limited company, the shares in the company are transferable in the manner provided by the articles. If the provisions of the articles are complied with, any such transfer is valid. Under s. 103 of the Companies Act 1965 (the Act) if a proper instrument of transfer has been delivered to the company, it cannot refuse the registration of such transfer. Under s. 104 of the Act, on the request in writing of the transferor of any share, the company is required to enter in the register the name of the transferee. If the company refuses to register a

transfer, it must within one month after the date on which the transfer was lodged with it, send to the transferor and to the transferee notice of the refusal: Section 105. If the company fails to comply, it and every of its officers commit an offence. In this particular case, LWF wanted to transfer 20,000 of his shares in the company to the 1st and the 2nd defendants. *Prima facie* those shares are transferable unless done in a manner contrary to the provisions in the articles. Then on 30 April 1993 LWF sought the approval of the company for the transfers of those shares, and it was so registered in the register of members of the company, albeit on 29 April 1993 by the secretary of the company. There is nothing in the pleadings of the plaintiff whether or not proper instrument of transfer was delivered to the company. The plaintiff tried hard to refuse the transfer on becoming aware of it but a meeting convened for the purpose reached a dead lock in the sense that there was no effective refusal by the board of directors. So under those circumstances, with the pleadings lacking in material particulars, how is it to say that the transfer of those shares and the registration of the 1st and the 2nd defendants as members are illegal and not valid. So, if the transfer and the registration are *prima facie* valid, the two defendants as members of the company enjoy the rights and privileges given by law as members.

As members, pursuant to s. 145(2) of the Act, they together with LWF called for an extraordinary general meeting to appoint additional directors of the company. Naturally unhappy with it the plaintiff tried to prevent the meeting by informing LWF on 11 March 1993 that the notice of the meeting was illegal and not valid as at the material time, the 1st and 2nd defendants were not shareholders of the company. If, as stated above, *prima facie* they were members, how could the notice be illegal and not valid on that ground as contended by the plaintiff? On the same day, the plaintiff also informed the 3rd defendant, its secretary, that the transfer of shares and any registration thereof were illegal and not valid. Again, why is this so, is not disclosed in the pleadings, except for the fact that the registration was done on 29 April 1993 i.e. a day before the date of the letter of LWF seeking approval for the transfer of those shares. The issue here is, does the registration done a day earlier than the letter seeking the approval for the transfer render the transfer and registration illegal and not valid as contended by the plaintiff in the pleadings? As mentioned earlier, *prima facie*, shares in the company are transferable. On the delivery of a proper instrument of transfer to the company, the transfer becomes registrable and on the request in writing made by the transferor, the company is obliged to enter in the register the name of the transferee. It is not disclosed in the pleadings whether the approval sought by LWF for the transfer of those shares was in fact the request made pursuant to s. 104 of the Act. Also it is not disclosed in the pleadings whether a proper instrument of transfer has been delivered to the company in compliance with s. 103 of the Act and if so when. If the proper instrument of transfer has been delivered before 30 April 1993 then the transfer became registrable before that date as might well has happened in this case when according to the pleadings the transfer was already registered on 29 April 1993. As the pleadings lack material particulars, the application for the entry in the register could well have been made by the 1st and 2nd defendants as transferees of those shares before the letter of LWF seeking approval for the transfers. If that be so, the entry in the register of the names of the two defendants before 30 April 1993 cannot be illegal and invalid because subsection (1) of s. 104 of the Act equates only the request in writing of the transferor to that of an application for the entry made by the transferee. It is not clear from the pleadings whether the approval sought by LWF is in fact the application for the entry in the register of the names of the two defendants so as to declare the entry made a day earlier as being illegal and invalid. So, if it cannot be ascertained from the pleadings that the transfer and registration were invalid or illegal, then it follows that the defendants were entitled to issue notice for the meeting to appoint additional directors. On the appointed date of the meeting the plaintiff absented himself, which is revealed by the pleadings that on 24 May 1993 he was handed by the 3rd defendant the minutes of the said meeting in which he was not present. The minutes record the appointments of the two defendants as two additional directors of the company. On 26 May 1993 the plaintiff through his advocates informed the two defendants that their appointments were illegal and not valid. In para 19 of the pleadings the plaintiff avers that the notice of the meeting was illegal and invalid, principally because the two defendants were not shareholders on the date of issue of the

notice of meeting. For the reason given earlier owing to the lacking in material particulars in the pleading, the averment cannot stand to establish that the transfer of shares and registration were illegal and invalid thereby disentitling the two defendants to be members of the company. For the reasons stated, I am satisfied that there is no basis for the granting of the various declarations sought in prayers (ii), (iii) and (iv) of the amended statement of claim of the plaintiff.

Under prayer (iv)(a) the plaintiff prays for a declaration that any of the board of directors' meetings of the company attended by the two defendants in their capacities as directors including the board's meeting to be held on 2 June 1993 in Kuala Lumpur were illegal and invalid. By para 20 of the amended statement of claim the plaintiff avers that by a notice of a board meeting dated 26 May 1993 the third defendant convened a board meeting to be held in Kuala Lumpur on 2 June 1993. If for the reason stated earlier that the material facts are not sufficiently pleaded to enable the determination of the status of the two defendants as members of the company, this prayer certainly has no merit at all.

For the same reason there is no merit on the pleadings of the plaintiff for orders sought in the rest of the prayers contained in the amended statement of claim of the plaintiff. In the circumstances I agree with the defendants that the amended writ of summons and amended statement of claim both dated 17 June 1993 disclose no reasonable cause of action. On this ground alone, I am satisfied that the pleadings of the plaintiff ought to be struck out. It is no longer necessary for me to go further to determine whether they are scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court, as it is clear in my mind that the pleadings as they stand, are lacking in material particulars to found an action against the three defendants.

The claim by the plaintiff against the three defendants is hereby struck out under O. 18 r. 19 of the RHC with costs of the action including costs of this application to the defendants to be taxed.

LIAN HUP MANUFACTURING CO. SDN. BHD.

v.

UNITATA BERHAD

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[ORIGINATING MOTION NO. R8-32-116-87]
15 FEBRUARY 1994

ARBITRATION: Sections 23 & 24 Arbitration Act 1952 - Application to set aside award of arbitrator or alternatively that award be remitted to another arbitrator to be heard afresh - Allegation by applicant of misconduct by arbitrator - Whether arbitrator conducted proceedings fairly - Whether applicant refused opportunity to call witnesses - Whether submissions by Counsel for respondent improperly allowed - Allegation that arbitrator awarded different rates of interests on various dates on the award without hearing any evidence - Whether arbitrator exceeded authority - Consideration of s. 11 Civil Law Act 1956.

The case before the Court was an application by the applicant pursuant to s. 23 and/or s. 24 of the Arbitration Act 1952 (Revised 1972) and/or under the inherent jurisdiction of the Court to set aside the award of the arbitrator dated 2 September 1987 or alternatively; that the award be remitted to another arbitrator to be heard afresh.

At the hearing of the application Counsel for the applicant alleged that the arbitrator had misconducted himself in the course of the proceedings. Two grounds were mainly relied on, namely; that the applicant's witnesses were not heard by the arbitrator and that the arbitrator had exceeded his authority in awarding interest at different rates in respect of each year from 1984 to 1987. Counsel for the respondent on the other hand submitted that there was no irregularity in the arbitration proceedings or in the award and even if there was an irregularity, no substantial miscarriage of justice had been caused.

Held:

[1] It was not in dispute that the arbitrator heard the oral evidence of the respondent's representative. The Court found nothing in the record of the arbitration proceedings on 22 May 1987 that the arbitrator refused to hear the oral evidence of the applicant's witness. However, the Court found that the arbitrator should have given the witnesses of both parties the opportunity to be heard at the continued hearing as the